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9 UNITED STATES DISTRICT COURT  
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 ROBERT SHERMAN BERRY,

15 Defendant.

2:96-CR-00259-WFN-1

United States' Objections to the  
Presentence Investigation Report

16 Plaintiff, United States of America, by and through William D. Hyslop, United  
17 States Attorney for the Eastern District of Washington, and Joseph H. Harrington,  
18 Assistant United States Attorney, for the Eastern District of Washington, respectfully  
19 submits the following objections to the Presentence Investigation Report ("PSIR")  
(ECF 482).

20 INTRODUCTION

21 The original PSIR, dated September 12, 1997 and authored by former probation  
22 officer Al Barrett, noted the Defendant had a long history of criminal behavior and,  
23 based on the crimes for which he was convicted, "is a very dangerous individual  
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1 capable of violent acts.” PSIR p. 25 (Nov. 1997). The Defendant, and his  
2 coconspirators, ascribed to a twisted, religious coterie called the Phineahs Priesthood.<sup>1</sup>

3 At this juncture, Defendant’s conduct and criminal acts underlying the crimes  
4 for which he was charges and convicted have not changed. What has changed is the  
5 vacature of the Defendant’s conviction for violating 18 U.S.C. § 924(c) as charged in  
6 Counts 3 & 7 of the Superseding Indictment (*see* ECF 472), the advisory nature (as  
7 distinguished from the mandatory nature) of the Sentencing Guidelines, and the  
8 greater emphasis on the sentencing factors under 18 U.S.C. § 3553 which allow the  
9 imposition of statutory maximum penalties where appropriate and justified.

#### 10 DISCUSSION

11 The instant PSIR, dated February 14, 2020 and authored by Probation Officer  
12 Sean Carter, appears to be complete and accurate as a supplement to the previous  
13 PSIR, with the following exceptions.

- 14 • As noted in the earlier PSIR, the Defendant has several aliases not listed in  
15 the instant PSIR, but should for completeness – Jim Preston, Scott  
16 Westmann, and Byran Vurmullien. PISR p.2.
- 17 • The statutory penalty for violating 18 U.S.C. § 924(c) as charged in Count 5  
18 of the Superseding Indictment is 30 years. *See* 18 U.S.C. § 924(c) (1997)  
19 (“imprisonment for thirty years, \* \* \*.”).<sup>2</sup> PSIR p. 2 and p.24, ¶ 173.

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22 <sup>1</sup> See the instant PSIR at pp. 7-8, ¶¶ 24-35 (coconspirators left a letters at two  
23 crime scenes regarding usury, Babylonian society, and symbol of Phinehas Priesthood  
24 justifying violent actions).

25 <sup>2</sup> It appears the applicable penalty provisions are those enacted at the time the  
26 original sentence was imposed, not such provisions in effect at this late date by way of  
27 a habeas corpus proceeding. *See* General Savings Statute, 1 U.S.C. § 109. *See also*  
28 *United States v. Augustine*, 712 F.3d 1290 (9th Cir. 2013).

- The statutory penalty for violating 18 U.S.C. § 924(c) as charged in Count 9 of the Superseding Indictment is twenty years. *See* 18 U.S.C. § 924(c) (1997) (“imprisonment for twenty years, \* \* \*.”).<sup>3</sup> PSIR p. 2 and p.5, ¶ 192.
- The enhancement associated with the use of firearms in connection with the Armed Bank Robbery charged in Count 4 (as distinguished from capturing the use of the pipe bomb during the robbery in Count 5) should apply. That is to say, the use of firearms creates a different harm than that created by the pipe bomb. While no firearm was discharged several were plainly used. Hence, a 5-level enhancement (USSG §2B3.1(b)(2)(C)) is appropriate and does not amount to double counting. Therefore, application of this enhancement results in Adjusted Offense level 31. *Cf.* PSIR pp.13-14, ¶¶ 67 – 72. This, in turn, affects the Multiple Count Adjustment, beginning with level 31 and adding 4 levels, equating to a Total Offense Level of 35. PSIR p.17, ¶¶ 104 – 110.
- The PSIR, in PART E, Factors That May Warrant Departure (p.29, ¶ 251) overlooks the applicability of USSG §5K2.6 which addresses the use of a dangerous weapon – in this case a shrapnel-covered pipe bomb – during the commission of an offense, here Count 6. Here, the manner in which the pipe bomb was used and detonated resulting in serious damage and grave risk of injury or death to others, and the intent to imbue the greater Spokane region with unmitigated FEAR<sup>4</sup> plainly militates consideration and application of this

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<sup>3</sup> *See* General Savings Statute, 1 U.S.C. § 109. *Supra.*

<sup>4</sup> Indeed, by way of a departure, Chapter Three Adjustments at USSG §3A1.4 (Terrorism) provided a compass where, as the circumstances here may be viewed as “imperfect terrorism” because a government building has not targeted, the Guidelines range would be 210 – 262.

1 Chapter 5 Upward Departure. This is consistent with the comments at PSIR p.  
2 29, ¶ 254-56.

3 **CONCLUSION**

4 The United States submits that, based on the foregoing comments and  
5 observations, the PSIR should appropriately be modified consistent therewith.

6  
7 Dated: February 28, 2020.

8 William D. Hyslop  
9 United States Attorney

10 s/Joseph H. Harrington  
11 Joseph H. Harrington  
12 Assistant United States Attorney  
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15 **CERTIFICATE OF SERVICE**

16  
17 I hereby certify that on February 28, 2020, I electronically filed the foregoing  
18 with the Clerk of the Court using the CM/ECF system which will send notification of  
19 such filing to the following:

20 John P. Nollette  
21 Attorney at Law  
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